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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1378

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

WILLIAM COSBY,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

ROBERT A. HAMPE
1108 Olive Street, Fifth Floor
St. Louis, Missouri 63101
(314) 621-1701
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision and Statute Involved	2
Statement of Facts	3
A. Conviction and Sentence	3
B. Voir Dire Examination	3
Reasons for Granting the Writ	5
Appendix	A-1

Cases Cited

Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519 (1950)	5
Gorin v. United States, 313 F.2d 641 (7th Cir. 1963)	8
Ham v. South Carolina, 409 U.S. 524, 93 S. Ct. 848 (1973)	5, 6, 7, 8
Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961)	5
Kuzniak v. Taylor Supply Company, 471 F.2d 702 (6th Cir. 1972)	9
Morford v. United States, 339 U.S. 258, 70 S.Ct. 586 (1950)	5
Ristaino v. Ross, No. 74-1216, — U.S. —, 18 Cr.L. 3082 (1976)	8, 9

FLEED THROUGH

Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965) .. 5, 7

United States v. Bear Runner, 502 F.2d 908 (8th Cir. 1974) 9
United States v. Blount, 479 F.2d 650 (6th Cir. 1973) ... 7
United States v. Booker, 480 F.2d 1310 (7th Cir. 1973) 9
United States v. Carter, 440 F.2d 1132 (6th Cir. 1971) 9
United States v. Cosby, No. 75-1570 — F.2d — (8th Cir. 1976) 4, 8
United States v. Gassoway, 456 F.2d 624 (5th Cir. 1972) 8
United States v. Grant, 494 F.2d 120 (2nd Cir. 1974) ... 9
United States v. Martin, 507 F.2d 428 (7th Cir. 1974) .. 8
United States v. Perez-Martinez, 525 F.2d 365 (9th Cir. 1975) 9
United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973) 8
United States v. Wooton, 518 F.2d 943 (3rd Cir. 1975) .. 7

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968) 5

Statutes Cited

Rule 24(a) Federal Rules of Criminal Procedure 2, 8

Sixth Amendment, United States Constitution 2

21 U.S.C. § 841(a)(1) 3

28 U.S.C. § 1254(1) 2

Text Cited

Babcock Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545 (1975) 7

Spears, Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges, 27 Stan. L.Rev. 1493 (1975) 10

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported, but is appended hereto as Exhibit A.

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JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1975. A petition for Rehearing and Rehearing In Banc was denied on February 27, 1976. (Exhibit B) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the defendant in a criminal case is entitled to have prospective jurors voir dired regarding the presumption of innocence of the defendant and the Government's burden of proof of beyond a reasonable doubt.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

2. Rule 24(a) of the Federal Rules of Criminal Procedure provides that:

> The Court may permit the defendant or his attorney and the attorney for the Government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the Court shall permit the defendant or his attorney and the attorney for the Government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

STATEMENT OF FACTS

A. Conviction and Sentence

Petitioner, William Cosby, was convicted by a jury in the United States District Court for the Eastern District of Missouri on two Counts of a ten-count indictment that charged that during January and February, 1975, the Petitioner and two other men had unlawfully distributed substantial quantities of heroin in the City of St. Louis, Missouri in violation of 21 U.S.C. § 841 (a)(1). The District Court imposed concurrent sentences of twelve years imprisonment on each Count to be followed by a special parole term of three years. The Court of Appeals affirmed.

B. Voir Dire Examination

At trial, the voir dire examination of the prospective jurors was conducted by the Court. At the conclusion of the individual questioning of each member of the panel by the Court, counsel for Petitioner submitted seven questions to be asked of the veniremen. The seven questions were:

> 1. Is there anyone on the panel who argues with the proposition that the Government must prove the defendant guilty beyond a reasonable doubt?
>
> 2. Is there anyone on the panel who argues with the proposition that the Government has the burden of proof?
>
> 3. Is there anyone on the panel who argues with the proposition that the defendant is presumed innocent unless and until the Government meets its burden of proving guilt beyond a reasonable doubt, if the Government ever does?
>
> 4. Is there anyone on the panel who does not look at the defendant and presume him to be innocent as he sits before you?

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5. Is there anything about the nature of the offense, sale of narcotics which would affect your ability to judge this case fairly on the evidence you hear?

6. Is there anything about the fact that the defendant is a black man that would affect your ability to judge this case fairly on the evidence you hear; in other words, would any of you be more inclined to find the defendant guilty or not guilty because he is black?

7. Those of you who had prior jury service, what was the nature of the charge?

The Court refused to ask questions 1-4 for the reason that the jury would be instructed on the law on those matters. The Court agreed to interrogate the panel as to questions 5, 6, and 7. Defense counsel's objection was overruled.

On appeal to the Eighth Circuit, Petitioner argued that the refusal to question the venireman on the matters contained in Defense questions 1-4 deprived the Petitioner of his constitutional right to be tried by an impartial jury and thus required reversal. The Court of Appeals for the Eighth Circuit held that,

> ". . . the District Court adequately protected the procedural rights of the defendant when it told the jury that the indictment was not any evidence of guilt and when it ascertained that the jurors would be willing to be governed by the Court's instructions as to presumption of innocence, burden of proof, and other instructions of the Court, and that the District Court did not abuse its discretion when it refused to ask the members of the panel whether they "argued" with the legal principles that have been mentioned. The jurors were obligated by their oath to accept the law as given them by the Court and to return a verdict in accordance with the law and the evidence, and the presumption is that the jurors did their duty." *United States v. Cosby*, No. 75-1570 — F.2d — (8th Cir. 1976) at pg. 12.

REASONS FOR GRANTING THE WRIT

1. Because the restraints and limitations that may be constitutionally placed on voir dire are subject to consideration at every single criminal and civil trial throughout the United States and the subjects of the voir dire questions refused in this case are basic concepts common to *every* criminal trial.

The importance of voir dire has been acknowledged by every Court which has ever considered the limitations and restrictions that may properly be placed upon the interrogation of veniremen. *Ham v. South Carolina*, 409 U.S. 524, 93 S. Ct. 848 (1973); *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965). As Justice Marshall explained in his concurring opinion in *Ham*, supra,

> "the right to challenge members of a jury panel was one of the most important rights secured to an accused and . . . the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated." Id. 409 U.S. at 533, 93 S.Ct. at 853.

It is not surprising, then, that this Court has on several occasions invalidated decisions and awarded new trials where the accused had been restricted in his jury voir dire. And while most of these cases have involved refusal to interrogate the prospective jurors regarding *racial* prejudice, e.g. *Ham v. South Carolina*, supra; *Swain v. Alabama*, supra; these reversals have not been confined to any specific area of juror bias. See *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968) (Capital Punishment); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961) (Pretrial Publicity); *Morford v. United States*, 339 U.S. 258, 70 S.Ct. 586 (1950) and *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519 (1950) (Communist affiliation).

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And it is proper and necessary that the accused is not confined during his voir dire to specific areas.

> "It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict." *Ham v. South Carolina*, supra (Marshall dissenting), U.S. at 532-533 S.Ct. at 853.

Of course, the majority opinion in *Ham* found it impossible to constitutionally distinguish possible prejudice against beards from a host of other possible prejudices and therefore upheld the decision of the Trial Court to refuse to question the jurors on that subject.

However, the distinctive quality that was absent in *Ham* is readily apparent in this case. The questions submitted by counsel to be asked of the veniremen did not concern personal attributes or features of the Petitioner, subjects which may be considered trivial and insignificant when balanced against the time consumed in questioning. Rather, the four questions refused by the Trial Court dealt with concepts which are basic to our system of criminal justice and form an integral part of every criminal trial in this country, to-wit, the presumption of innocence of the accused and the Government's burden of proof beyond a reasonable doubt.

Certainly, these concepts are as well entrenched and of the same constitutional stature as the ban on racial prejudice. And it is certainly just as important to the accused that he be aware of any juror prejudice against him because he has been *accused* of a crime or because of an inherent belief that an *accused should prove* his innocence as it is that he know of any racial prejudice.

To allow this decision, a decision which really fails to consider the constitutional issues involved, to stand, would open

the doors to severe restrictions on jury voir dire in all areas other than racial prejudice.

2. The United States Courts of Appeals are in conflict over this issue.

The opinion handed down in this case by the Eighth Circuit apparently adopts the rationale of *United States v. Wooton*, 518 F.2d 943 (3rd Cir. 1975). That case held that the trial court did not abuse its discretion in precluding examination of prospective jurors as to whether they could accept the proposition that the Government must prove every material element of the crime charged beyond a reasonable doubt.

In reaching that decision, the Third Circuit recognized that its opinion was contrary to the opinion of the Sixth Circuit Court of Appeals in *United States v. Blount*, 479 F.2d 650 (6th Cir. 1973). The Sixth Circuit had held that the failure of the trial court to ask the prospective jurors if they could accept the proposition that the defendant was presumed innocent and the Government had the burden of proving him guilty beyond a reasonable doubt was reversible error.

In light of these contrary decisions it is clear that definitive ruling by this Court is needed to determine the propriety of a failure to interrogate prospective jurors on these matters.

3. The need for judicial guidelines as to the content and method of voir dire.

As important as voir dire may be toward insuring a trial by an impartial jury, *Swain v. Alabama*, 380 U.S. 202 (1965); *Ham v. South Carolina*, 409 U.S. 524 (1973); Babcock *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan.L. Rev. 545 (1975), there are few guidelines as to the content and method of interrogating a jury venire.

Rule 24(a) of the Federal Rules of Criminal Procedure provides that:

> The Court may permit the defendant or his attorney and the attorney for the Government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the Court shall permit the defendant or his attorney and the attorney for the Government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

In other words, the District Court has broad discretion to control the scope of the voir dire examination *Ham v. South Carolina*, supra; *Ristaino v. Ross*, No. 74-1216, — U.S. —, 18 Cr.L. 3082 (1976), and "it is only rarely that a supposed deficiency in a voir dire examination will call for correction by an appellate Court." *United States v. Cosby*, No. 75-1570, — F.2d — (8th Cir. 1976) at pg. 9.

Unfortunately, case law fails to provide a clear analysis of when these rare instances arise. The conflict among the appellate circuits over the issue raised in this petition has already been described. But there is also conflict in many other areas regarding voir dire.

For example, in *United States v. Robinson*, 475 F.2d 376 (D.C. Cir. 1973) and *United States v. Martin*, 507 F.2d 428 (7th Cir. 1974), the courts held that it was error to refuse to question prospective jurors whether they would lend more credence to the testimony of police officers than other witnesses merely because they were police officers. But in *United States v. Gassoway*, 456 F.2d 624 (5th Cir. 1972) and *Gorin v. United States*, 313 F.2d 641 (7th Cir. 1963) the Courts held that such a refusal was not error.

In the recent decision of *Ristaino v. Ross*, supra, this Court explained that a black defendant had no constitutional right per se to have the veniremen questioned about racial prejudice. But the Court did not discuss whether, assuming error in the voir dire, this constituted reversible error. The Seventh Circuit, in *United States v. Booker*, 480 F.2d 1310 (7th Cir. 1973), and the Sixth Circuit, in *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971), have held that the refusal to interrogate as to racial prejudice is reversible error, regardless of the evidence of guilt. The Second Circuit, in *United States v. Grant*, 494 F. 2d 120 (2nd Cir. 1974), held that such a refusal constituted harmless error where there was substantial evidence of guilt.

Furthermore, while this Court in *Ristaino v. Ross*, supra, decided that the refusal to inquire into racial prejudice did not raise issues of constitutional dimensions, the Court did state that under its supervisory power, a federal court would have been required to have inquired on this matter. Id. at 3084, f.n. 9.

But the Court did not set forth any guidelines that the Federal Courts could follow and thus did not help solve another of the conflicts between the Circuits regarding jury voir dire, to-wit: races and backgrounds about which the jury must be questioned. Compare *Kuzniak v. Taylor Supply Company*, 471 F. 2d 702 (6th Cir. 1972), where it was held reversible error to refuse to question jurors about prejudice against Austrian Nationals where one party was an Austrian National, and *United States v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974), where it was reversible error to refuse to question specifically about racial prejudice against Indians, with *United States v. Perez-Martinez*, 525 F.2d 365 (9th Cir. 1975), where it was not error to refuse to question about prejudice against Cubans.

Petitioner feels that it is mandatory that this Court establish guidelines which lower courts and attorneys can follow in su-

pervising and conducting voir dire. For as a recent law review article states:

> "Present standards of appellate review of voir dire issues reaffirmed by the Supreme Court in *Ham* neither assure the informed exercise of peremptories nor offer guidance to trial courts confronted with the hard choices of defining the proper scope of voir dire. Accordingly, while variations in practice exist at the state and federal levels; many Courts seem to view voir dire as an either/or choice between limiting questions solely to showing grounds for cause, or allowing inquiry into as many areas as there are conceivable reasons for exercising peremptories. At both extremes—either because the voir dire is too perfunctory to serve its intended purpose or because it is so unsupervised that counsel misuse it—potentially serious consequences of jury bias or wasted court time may ensue." Spears, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stan. L.Rev. 1493 (1975).

This same article has suggested such guidelines and petitioner has attached them hereto as Exhibit C.

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

ROBERT A. HAMPE
1108 Olive Street, Fifth Floor
St. Louis, Missouri 63101
(314) 621-1701
Attorney for Petitioner

APPENDIX

United States Court of Appeals for the Eighth Circuit

No. 75-1570

United States of America, Appellee, v. William Cosby, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: December 10, 1975

Filed: February 9, 1976

Before Lay, Bright and Henley, Circuit Judges.

Henley, Circuit Judge.

William Cosby, appellant here and defendant below, was convicted by a jury in the United States District Court for the Eastern District of Missouri[1] on two counts of a ten-count indictment that charged that during January and February, 1975 the defendant and two other men, Phelbert Angle and Danny Joseph Mayer, had unlawfully distributed substantial quantities of heroin in the City of St. Louis, Missouri in violation of 21 U.S.C. § 841(a)(1). The defendant was convicted on Counts IV and VII of the indictment in which counts both he and Angle were named as defendants. The district court imposed concurrent sentences of twelve years imprisonment on each count to be followed by a special parole term of three years. Defendant appeals.

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[1] The Honorable H. Kenneth Wangelin, United States District Judge.

The fourth count of the indictment charged that on or about January 30, 1975 the defendant and Angle unlawfully distributed 6.80 grains of heroin, and the seventh count charged that on or about February 26, 1975 the defendant and Angle unlawfully distributed 2.42 grains of heroin.[2] It will be observed that in neither of those counts was the distributee of the drug identified nor was a distributee identified in any of the other counts of the indictment.

Numerous pretrial motions were filed on behalf of the defendant and he was able to obtain a good deal of information, most of it negative, from government counsel. Counsel for the defendant did not move for a bill of particulars and did not specifically request that the distributee of the drugs mentioned in Counts IV and VII be identified. Counsel did call upon the government to produce any informant involved in the case, and the government responded by saying that no informant was involved.

At the commencement of the trial defense counsel submitted seven written questions that he asked to be propounded by the trial judge to the members of the jury panel in the course of voir dire examination which was to be conducted by the trial judge personally. See Fed. R. Crim. P. 24(a). Four of those questions would have inquired of the members of the panel as to whether they agreed with certain fundamental concepts of American criminal procedure such as the presumption of innocence, burden of proof, and reasonable doubt. The other three questions dealt with other matters, including the possibility of racial prejudice. Cosby is a black man.

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[2] The first, second, third and fifth counts charged Angle alone with unlawful distributions. The sixth, eighth, ninth and tenth counts charged Mayer alone with unlawful distributions. Angle and Mayer each pleaded guilty to one count in which they, respectively, were named as defendants; the other counts against them presumably were dismissed. The defendant, Cosby, stood trial alone.

The district court indicated that he would interrogate the jury with respect to the ground covered by the last three questions but would not propound the first four because "I will instruct the jury on what the law is on those matters and I assume they'll follow my instructions." We will return to this subject in due course.

After opening statements had been made, the government called a number of witnesses, introduced certain exhibits, and rested. Counsel for the defendant then moved for a judgment of acquittal on the ground that there was a fatal variance between the charges against him and the government's proof. That motion was denied. The defendant then rested with the government; the case was argued, and the jury instructed. As indicated, the defendant was found guilty on both of the counts against him.

The defendant contends for reversal that the district court erred in refusing to propound, at least in substance, the first four voir dire questions suggested by defense counsel,[3] and that the district court erred in denying the defendant's motion for a judgment of acquittal.

From the evidence in the case the jury was justified in finding substantially the following facts, which were not disputed except to the extent that defense counsel undertook by cross-

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[3] The four questions are:

1. Is there anyone on the panel who argues with the proposition that the Government must prove the defendant guilty beyond a reasonable doubt?

2. Is there anyone on the panel who argues with the proposition that the Government has the burden of proof?

3. Is there anyone on the panel who argues with the proposition that the defendant is presumed innocent unless and until the Government meets its burden of proving guilt beyond a reasonable doubt, if the Government ever does?

4. Is there anyone on the panel who does not look at the defendant and presume him to be innocent as he sits before you?

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examination to break down the testimony of government witnesses:

In the winter of 1975 the defendant was selling heroin in St. Louis, and Angle and Mayer were customers of his. Both Angle and Mayer were heroin addicts. Angle had been using the drug for some twenty or twenty-five years; Mayer had been using it for about four years. During January, 1975 Angle and Mayer shared the same apartment in St. Louis, but Angle had moved out shortly before the date alleged in Count VII of the indictment.

During January and February, 1975, Benny L. Green, a detective employed by the St. Louis Police Department, was conducting an undercover operation relating to the illicit drug traffic in the City. Green had dealings with both Angle and Mayer, neither one of whom was aware that Green was a law enforcement officer. Green had no direct dealings with the defendant.

On the occasion mentioned in Count IV of the indictment, Green was able to obtain from the defendant the quantity of heroin mentioned in that count. The defendant dealt directly with Angle who was acting as Green's intermediary; Angle paid for the heroin with money furnished by Green and turned the drug over to Green. Green obtained the heroin mentioned in Count VII of the indictment in substantially the same way in which he had obtained the drug mentioned in Count IV. As to the transaction which resulted in Count VII, Mayer participated to some extent, supplied some of the money that was given to Angle and that went ultimately to the defendant, and received for his own use or resale some of the heroin that Angle acquired from the defendant.

The defendant knew of course that he was selling heroin to Angle, and he probably also knew that Angle was in turn disposing of all or part of the substance by selling or otherwise distributing it to others. Naturally, the defendant did not know

that Angle was turning the drugs over to an undercover police officer. Neither did Angle or Mayer.

Defendant's claim of variance is that the indictment charged the defendant and Angle with a joint distribution of heroin to a third person whereas the proof showed that actually the defendant sold the heroin to Angle, and that Angle later "distributed" the drug to Green. To put it slightly differently, defendant argues that the indictment charges that he and Angle were engaged in a "joint venture" of selling drugs to third parties whereas there was no such joint enterprise.

In view of the evidence in the case we see no merit in this contention.

Fed. R. Crim. P. 52(a) provides that an error, defect, irregularity, or variance that does not affect substantial rights is to be disregarded. A variance between indictment and proof in a criminal case may prejudice a defendant substantially if it prevents him from presenting his defense properly, if it takes him unfairly by surprise, or if it exposes him to the risk of double jeopardy. But unless such a variance prejudices the defendant in one or more of those ways, it is not fatal. *United States v. Good Shield*, 515 F.2d 1 (8th Cir. 1975), and cases there cited.

We will assume, at least for purposes of discussion, that a variance exists where an indictment charges a joint distribution of heroin by two defendants to an unidentified distributee and the proof shows that the defendant complaining of the variance in fact sold the heroin to the other defendant who in turn passed it on to an ultimate distributee identified in the evidence. In this case, however, we do not see that the assumed variance[4] adversely affected any substantial rights of the defendant.

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[4] We are not at all sure that the alleged variance of which the defendant complains was really a variance. Both the defendant and

BLEED THROUGH

In a prosecution for an unlawful distribution of heroin under § 841(a)(1) the identity of the distributee is not an essential element of the offense charged, and the government is not required to identify the distributee in the indictment. *United States v. Martin*, 482 F.2d 202 (8th Cir. 1973). The same rule prevailed with respect to indictments returned under then existing prohibitions of sales of narcotics appearing in the Internal Revenue Code of 1954. *United States v. Crockett*, 421 F. 2d 649 (8th Cir. 1970); *McWilliams v. United States*, 394 F. 2d 41 (8th Cir. 1968), *cert. denied*, 393 U.S. 1044 (1969); *Hemphill v. United States*, 392 F.2d 45 (8th Cir.), *cert. denied*, 393 U.S. 877 (1968); *Aggers v. United States*, 366 F.2d 744 (8th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967).

The very fact that the defendant and Angle were charged with what may be construed as a joint distribution to an unnamed distributee was in itself sufficient to put the defendant and his attorney on notice that a third person was involved, and defense counsel must have known in view of the indictment that the third person was in all probability either an informant or a law enforcement officer who would surface in due course. Had counsel filed a motion for a bill of particulars inquiring as to the identities of the distributees in question, that information would in all probability have been supplied. *See Aggers v. United States, supra*, 366 F.2d at 746-47. But no such motion was filed.

The government did not mislead counsel when it advised that no informant was involved in the case because Green, An-

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Angle "distributed" the heroin referred to in the respective counts, and both violated the law when they did so. Both transactions can be viewed as continuous movements of heroin from the defendant to Green with Angle acting as a culpable intermediary; or, they can be characterized as sales from defendant to Angle with the subsequent transfers to Green being immaterial; or, it can be argued that the defendant knowingly aided and abetted Angle in an unlawful distribution of the heroin to Green.

gle and Mayer were not informants. Green was a police officer on duty, and Angle and Mayer were drug users and peddlers who did not know that they were dealing with an officer and that they would be prosecuted for their dealings.

With knowledge that no informant was involved, the defense probably knew that the unidentified distributee was an officer. In any event, it is plain from the record that the defendant and his attorney were not surprised at trial when Detective Green took the stand and when he and other witnesses revealed that the heroin that had passed originally from the defendant to Angle had in turn been passed on to Green.

Nor did the disclosure that Angle had been acting as an unwitting intermediary between the defendant and the police adversely affect the defendant in preparing his defense. In fact, he had no defense except to put in issue by his plea of not guilty all of the essential elements of the offenses charged and then hope that the jury would not be convinced beyond a reasonable doubt of the existence of those elements.

It appears to us that the defendant's trial tactics would have been no different from what they were had the indictment alleged in terms that the heroin had ultimately been passed on to Green by Angle, or had the defendant and Angle been indicted separately with respect to the sales of January 30 and February 26, or had no mention of Angle been made in the fourth and seventh counts of the indictment.

To our minds there is no possibility that the defendant will be prosecuted again for either of the sales in question.

Hence, we conclude on this phase of the case that the variance between charge and proof, if there was a variance, was not a fatal one.

As to the complaint about the district court's refusal to propound to the jury four of the voir dire questions suggested by

BLEED THROUGH

defense counsel, it appears that the questions were at least somewhat argumentative in form, and defense counsel concedes that the district court was not required to ask the questions in the precise form suggested by counsel. Counsel contends, however, that the district court should have explored more fully than it did the attitude of the prospective jurors about the legal presumption that a defendant is innocent until proven guilty and about the proposition that the burden is on the government to prove the guilt of the defendant by evidence and beyond a reasonable doubt. And counsel argues that the district court committed prejudicial error when it failed to go into those matters more deeply.

In passing upon this argument we do not minimize the importance of the role that a voir dire examination of prospective jurors should play in any trial, whether civil or criminal. On the other hand, we are required to recognize that the form and scope of a voir dire examination are matters that are left largely to the discretion of the trial judge and that it is only rarely that a supposed deficiency in a voir dire examination will call for correction by an appellate court. *See, e.g., Ham v. South Carolina*, 409 U.S. 524 (1973); *Aldridge v. United States*, 283 U.S. 308 (1931); *United States v. Nance*, 502 F. 2d 615 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *United States v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974); *United States v. Thompson*, 490 F.2d 1218 (8th Cir. 1974). *See also* 2 Wright, FEDERAL PRACTICE & PROCEDURE, CRIMINAL, § 381.

We have given very careful consideration to the transcript of the voir dire interrogation of the jurors by the district court and have also considered certain preliminary instructions that were given to the jurors who were selected to try the case, and to the final binding instructions as to the law that were given to the jury. We find defendant's contention that the voir dire examination was deficient is without any real substance.

To start with, we find that the interrogation conducted by the district court was detailed, careful and searching and was designed primarily to find out whether the prospective jurors were free from bias or prejudice and whether they could give the defendant a fair and impartial trial irrespective, among other things, of the nature of the charge against the defendant, of the defendant's race, and of their prior experience as jurors. And other possibilities of unfairness or partiality were explored.

Nor did the district court overlook the legal concepts embraced in the suggested questions which the court declined to propound.

At a very early stage of the examination and before the trial court declined to propound the four questions with which we are concerned, the court, after reading the two counts of the indictment in which the defendant was charged, told the jury in plain terms that the indictment that had been returned by the grand jury was simply a method of bringing the defendant to trial and informing him of the charge against him, that the indictment was not evidence and afforded no basis for an inference of guilt, and that the government had the burden of proving the defendant guilty beyond a reasonable doubt. At a later stage of the voir dire, and after the district court had declined to propound the first four questions suggested by defense counsel, the court said:

> Now, ladies and gentlemen, you will have questions put to you and instructions put to you concerning the presumption of innocence and that the burden of proof is on the government and I will instruct you on those things and other things from time to time, but I want to know at this time if there is anybody on this panel who has any preconceived ideas about what the law is in this case or any other case. Now, you know a lot of people, you get some street corner law and you get some advice here and there and the other, but is there anybody who has got

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> any idea about what the law is that is so fixed in your mind that you will disregard any instruction that I give you. In other words, will you abide by my instructions as to what the law is as to the presumption of innocence, the burden of proof or any other instruction I give you in this case? If there's anybody who will not, raise your hand.

No hand was raised.

And the district court also stated, "* * * if there's anybody here who for any reason cannot give both sides an absolutely fair and impartial hearing if they're chosen to serve here; if you can't do it, just raise your hand at this time." Again, no hand was raised.

Thereafter, a jury of twelve and one alternate was selected and sworn to try the case. Before opening statements were made the district court gave the jurors some preliminary instructions that included the following statement:

> Faithful performance by you of your duties is vital to the administration of justice. The law applicable to this case will be contained in the instructions I give you during the course of the trial and it is your duty to follow all such instructions * * *"

In the course of the district court's final charge to the jury, that body was fully, fairly and correctly instructed about presumption of innocence, burden of proof, and reasonable doubt, and the court specifically told the jury that the law never imposes upon a defendant in a criminal case the burden of calling or duty to call witnesses or produce witnesses in his behalf.

As to the voir dire examination itself, we think that the district court adequately protected the procedural rights of the defendant when it told the jury that the indictment was not

any evidence of guilt and when it ascertained that the jurors would be willing to be governed by the court's instructions as to presumption of innocence, burden of proof, and other instructions of the court, and that the district court did not abuse its discretion when it refused to ask the members of the panel whether they "argued" with the legal principles that have been mentioned. The jurors were obligated by their oath to accept the law as given them by the court and to return a verdict in accordance with the law and the evidence, and the presumption is that the jurors did their duty.

A voir dire problem quite similar to the one that we have just discussed was before the Court of Appeals for the Third Circuit recently in *United States v. Wooton*, 518 F.2d 943 (3d Cir. 1975), and our conclusion that the district court did not err in this case as far as scope of voir dire is concerned accords with the result reached in that case.

No errors appearing, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
for the Eighth Circuit
St. Louis, Mo. 63101
Robert C. Tucker Clerk

February 27, 1976

Mr. Robert A. Hampe
1108 Olive Building
5th Floor
1108 Olive Street
St. Louis, Missouri 63101

Hon. Donald J. Stohr
United States Attorney
St. Louis, Missouri

Re: No. 75-1570. U. S. v. William Cosby

Dear Sirs:

Enclosed herewith please find copy of an order entered by us today at the direction of the Court.

Very truly yours

ROBERT C. TUCKER
Clerk

db

Enc.

United States Court of Appeals
for the Eighth Circuit

75-1570 September Term, 1975

The United States,
Appellee,

vs.

William Cosby,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 27, 1976

Proposed Guidelines for Voir Dire Examination

1. The content of questioning shall be determined during pretrial proceedings. The Court shall permit inquiry into any area connected with (1) a significant legal or factual aspect of the case, or (2) a conspicuous characteristic of a party or an important witness.

Where a particular bias being probed is of a novel character, the proponent of that line of questioning may be required to lay a foundation for the inquiry by showing the likely existence of that bias among potential jurors in the community. If the proponent desires to ask questions not connected on their face with the case or party, he may be required to demonstrate the

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connection of these questions with biases that are more obviously related to the case or party.

A proponent is not required to demonstrate that a particular bias, if present, would in fact skew the jury's deliberations, nor on appeal must he show actual prejudice resulting from the failure to have a qualifying question put to the jurors. Rather, all nontrivial biases coming within the definitions of the preceding paragraphs are presumed to deny a jury's impartiality if not inquired into on voir dire.

2. The extent and form of a required line of questioning shall be within the trial court's discretion; provided, however, that sufficient followup questioning shall be allowed in order to penetrate the prospective juror's initial subjective self-evaluations and that, where possible, questions shall be phrased to seek specific, objective data from which jurors' attitudes may be inferred.

3. Any line of questioning deemed necessary under the preceding two guidelines defining content and extent of voir dire may be asked of the prospective jurors en masse, provided that each juror is required to respond individually. Additional lines of questioning not required by these rules but permitted by the court may be answered en masse by volunteered response or individually.

Whenever a question solicits information capable of prejudicing other jurors, the court shall require that answers be given by the jurors individually out of the hearing of the rest of the panel. Similar precautions shall be taken whenever responses are likely to be embarrassing to the juror replying.

Spears, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stan. L. Rev. 1493, 1515-1526 (1975).

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1378

WILLIAM COSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 529 F.2d 143.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1976. A petition for rehearing *en banc* was considered as a petition for rehearing and denied on February 27, 1976 (Pet. App. A-13). The petition for a writ of certiorari was filed on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court committed prejudicial error by refusing to ask prospective jurors four proposed questions.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 12 years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed.

The evidence (see Pet. App. A-4) showed that in the winter of 1975, while petitioner was selling heroin in St. Louis, Benny Green, a St. Louis Police Department detective, twice arranged to purchase heroin from petitioner through Phelbert Angle.[1] Angle, unaware that Green was a law enforcement officer, paid for the heroin on both occasions with money furnished by Green and turned the drug over to Green.

The trial judge conducted the *voir dire* of the jury panel. The court first read the pertinent counts of the indictment to the jury panel and instructed the panel that the indictment was not evidence of guilt (Tr. 5). The judge instructed the panel that the burden of proof was on the government to establish guilt beyond a reasonable doubt (Tr. 5) and inquired whether any of the veniremen would give special weight to the testimony of police officers (Tr. 22).

Defense counsel submitted seven questions to the court. Petitioner now contends that it was error not to ask four of the submitted questions,[2] each of which related

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[1]Angle and Danny Mayer, another customer of petitioner's who was involved in the second purchase of heroin, each pleaded guilty to one count of the indictment.

[2]The four questions are (Tr. 25-26):

1. Is there anyone on the panel who argues with the proposition that the Government must prove the defendant guilty beyond a reasonable doubt?

to the burden of proof or the presumption of innocence. The court declined to ask the questions. It promised, however, to instruct the jury concerning these matters and stated that it assumed the jury would follow the instructions (Tr. 25). The court then inquired whether anyone could not give the defendant a fair trial (Tr. 26); whether each juror would follow the trial court's instructions "as to what the law is as to the presumption of innocence, the burden of proof or any other instruction I give you in this cause" (Tr. 27); and whether there was any reason why a member of the panel would not give both sides "an absolutely fair and impartial hearing if they're chosen to serve" (Tr. 28).

After the jury was selected and sworn, and before opening statements were made, the court instructed the jurors that the law applicable to the case would be contained in the instructions given by the court during the course of the trial and that it was the jurors' "duty to follow all such instructions" (Tr. 30). During the court's final instructions to the jury (Pet. App. A-10),

> [the jury] was fully, fairly and correctly instructed about presumption of innocence, burden of proof, and reasonable doubt, and the court specifically told the jury that the law never imposes upon a defendant in

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2. Is there anyone on the panel who argues with the proposition that the Government has the burden of proof?

3. Is there anyone on the panel who argues with the proposition that the defendant is presumed innocent unless and until the Government meets its burden of proving guilt beyond a reasonable doubt, if the Government ever does?

4. Is there anyone on the panel who does not look at the defendant and presume him to be innocent as he sits before you?

> a criminal case the burden of calling or duty to call witnesses or produce witnesses in his behalf. [See Supp. Tr. 1-3, 8.]

ARGUMENT

The court of appeals correctly concluded (Pet. App. A-11) that the trial court had not abused its discretion by declining to ask prospective jurors the questions proposed by petitioner. District courts have broad discretion to determine the questions on *voir dire*. Fed. R. Crim. P. 24(a); *Ristaino* v. *Ross*, No. 74-1216, decided March 3, 1976, slip op. 6; *Hamling* v. *United States*, 418 U.S. 87, 139; *Ham* v. *South Carolina*, 409 U.S. 524, 528. As the court below stated (Pet. App. A-11):

> [T]he district court did not abuse its discretion when it refused to ask the members of the panel whether they "argued" with the legal principles that have been mentioned. The jurors were obligated by their oath to accept the law as given them by the court and to return a verdict in accordance with the law and the evidence, and the presumption is that the jurors did their duty.

The district court fully instructed the jury at the close of the evidence concerning the presumption of innocence, burden of proof, and reasonable doubt. Moreover, each of the jurors had been asked when they were impanelled whether they could abide by such instructions, and none said that he could not. The combination of questions on *voir dire* and instructions to the jury minimized any possibility of prejudice to petitioner. The courts of appeals routinely uphold procedures similar to those used here. *United States* v. *Wooten*, 518 F.2d 943, 945-947 (C.A. 3), certiorari denied, 423 U.S. 895; *United States* v. *Cockerham*, 476 F.2d 542, 544 (C.A.D.C.); *United States* v. *Crawford*, 444 F.2d 1404, 1405 (C.A. 10), certiorari

denied, 404 U.S. 855; *United States* v. *Gillette*, 383 F.2d 843, 849 (C.A. 2); *Stone* v. *United States*, 324 F.2d 804, 805-807 (C.A. 5), certiorari denied, 376 U.S. 938; *Gorin* v. *United States*, 313 F.2d 641, 647 (C.A. 1), certiorari denied, 379 U.S. 971.[3]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys.

JUNE 1976.

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[3]The contrary view expressed by the majority of the panel in *United States* v. *Blount*, 479 F.2d 650, 651 (C.A. 6), on which petitioner relies (Pet. 7), was explicitly rejected by the Third Circuit in *United States* v. *Wooten*, *supra*, 518 F.2d at 947, n. 7, a case in which the Court denied certiorari earlier this Term. *Wooten* correctly held that *Blount* failed to consider important policies, such as the need for reasonable expedition on *voir dire*. Since the decision below accords with the clear consensus among the circuits that have considered the necessity of asking prospective jurors questions such as those at issue here (a consensus, we submit, that represents a proper balancing of the conflicting interests involved in such circumstances), there is no reason for this Court to grant the petition. In light of the discretion traditionally accorded district courts on *voir dire*, this is not the sort of question requiring consistency among the circuits, in the absence of any reason to believe that the Sixth Circuit's rule is a substantial impediment to the administration of justice.